



## Montana Legislative Services Division

### Legal Services Office

Room 110 Capitol Building \* P.O. Box 201706 \* Helena, MT 59620-1706 \* (406) 444-3064 \* FAX (406) 444-3036

June 23, 2011

Representative Bob Wagner  
P.O. Box 191  
Harrison, MT 59735-0191

Dear Representative Wagner,

I am writing in response to your request for a legal opinion regarding whether it was a proper exercise of the Governor's veto power under Article VI, section 10(5), of the Montana Constitution to strike out individual grants to local government entities in House Bill No. 351 from the 2011 legislative session.<sup>1</sup> This legal opinion addresses your question.

### SUMMARY AND OVERVIEW

Article VI, section 10(5), of the Montana Constitution provides that the Governor may veto items in appropriation bills, and in such instances the procedure shall be the same as upon veto of an entire bill. Section A.1 of the analysis identifies what is meant by an appropriation and concludes that the Governor did not veto an appropriation. Sections A.2 and A.3 of the analysis cover delegate testimony from the 1972 Constitutional Convention and key Montana appropriation cases that may have a bearing on the outcome of your question, but unfortunately there are no Montana Supreme Court cases that define what is meant by the term "items in appropriation bills." Last, section B of the analysis applies policy and case law from Montana Supreme Court opinions to conclude that although there is no way to predict how a court would rule, there are many positive factors that could be put forward in support of an argument that the Governor exceeded his line-item veto authority.

### FACTS

House Bill No. 351 (HB 351) from the 2011 legislative session is a bill that generally appropriates money to the Department of Commerce (Department) for financial assistance to local government infrastructure projects through the treasure state endowment program. The bill was passed by both the Senate and the House and was transmitted to the Governor on May 2, 2011. As transmitted, section 1 of the bill contained a \$13,753,578 appropriation to the Department from the treasure state endowment state special revenue account to finance multiple grants for local governmental entities, all of which were ranked "in the order of their priority".<sup>2</sup> Section 2 contained a contingent appropriation that may increase the appropriation in section 1 by no more than \$840,000 for the

<sup>1</sup> House Bill No. 351 was enacted as Chapter 389, Laws of 2011, and becomes effective July 1, 2011. The bill is available on the internet at: <http://data.opi.mt.gov/bills/2011/billpdf/HP>

<sup>2</sup> Sec. 1(3), Ch. 389, L. 2011.

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purpose of making grants.<sup>3</sup> Lastly, there were several appropriations that were not related to the local government grants, including an emergency grant appropriation in section 6, an infrastructure appropriation in section 7, and a regional water system appropriation in section 8.

Section 1(6) stated that projects numbered 31 through 36 (lower-ranked projects) that have satisfied conditions for the grants may not receive grant funds unless sufficient funds have been deposited into the treasure state endowment special revenue account to fully fund projects numbered 1 through 30 (higher-ranked projects). In order to implement this requirement, the lower-ranked projects become eligible for grant funds if a subsequent legislature withdraws funding for higher-ranked projects, if the Department determines higher-ranked projects will be unable to meet the startup conditions in the bill, or when a project submits a written withdrawal to the Department indicating it no longer requires a grant.<sup>4</sup> The disbursement of any grant proceeds to a local governmental entity is subject to a series of conditions including the execution of a grant agreement, documentation of matching funds, an approved management plan, auditing and reporting requirements, compliance with any imposed conditions, and any other specific requirements considered necessary by the Department.<sup>5</sup>

On May 12, 2011, the Governor returned HB 351 to the Secretary of State. The Governor's letter indicated he signed HB 351 "into law with items 'struck-out,' or vetoed".<sup>6</sup> This was accomplished by striking 8 projects in section 1 and their corresponding "Grant Amount". The ranking, projects, and grant amounts that were struck are as follows:

<b>Applicant/Project</b>	<b>Grant Amount</b>
2. Park County (bridge)	555,626
3. Sheridan, Town of (wastewater)	750,000
5. Madison County (bridge)	699,931
9. Sweet Grass County (bridge)	156,678
11. Carbon County (bridge)	406,695
16. Fergus County (bridge)	276,157
20. Lincoln County (bridge)	287,827
26. Roundup, City of (water)	500,000

Everything else in HB 351 remained unchanged. However, based on the amount of support HB 351 received by both the House (82-17) and the Senate (28-22), individual legislators were polled for the purpose of determining whether there were enough votes to override the veto. In order to override the veto, two-thirds or more of the members of each house were required to vote to override the veto.<sup>7</sup> According to a poll spreadsheet from the Secretary of State 48 Representatives and 20 Senators voted to override the Governor's veto, indicating the line-item vetoes were sustained.

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<sup>3</sup> Sec. 2(3), Ch. 389, L. 2011.

<sup>4</sup> Sec. 1(6), Ch. 389, L. 2011.

<sup>5</sup> Sec. 4(1), Ch. 389, L. 2011.

<sup>6</sup> Letter from Brian Schweitzer, Governor, State of Montana, to Linda McCulloch, Secretary of State, State of Montana (May 12, 2011), available at <http://data.opi.mt.gov/bills/2011/BillPDF/HB0351GovLineVetoLtr.pdf>.

<sup>7</sup> Mont. Const. art. VI, sec. 10(4)(a).

## ANALYSIS:

### **A. THE GOVERNOR'S LINE-ITEM VETO POWER UNDER THE MONTANA CONSTITUTION.**

Article VI, section 10(5), of the Montana Constitution provides:

The governor may veto *items* in *appropriation bills*, and in such instances the procedure shall be the same as upon veto of an entire bill. (emphasis added)

This constitutional provision is interpreted by section 5-4-303, MCA, which states that if "a bill presented to the governor contains several distinct *items of appropriation of money*, the governor may disapprove *one or more items* while approving other portions of the bill." (emphasis added)

In order to properly understand the above constitutional provision, an understanding of what constitutes an appropriation under Montana law is necessary. Additionally, an analysis of what the term "items" may encompass is critical to the outcome. Section A.1 provides an overview of what constitutes an appropriation and concludes that the Governor did not strike out appropriations, while sections A.2 and A.3 provide a summary of key Montana appropriation cases. Ultimately there are no reported Montana Supreme Court cases that define what is meant by the term "items". As such, section B compares the facts from HB 351 to relevant Montana case law and discusses strengths and weaknesses on both sides of the issue. However, a persuasive argument can be made that the Governor exceeded his line-item veto authority by striking grants as opposed to an appropriation and the conditions of the appropriation.

#### **1. Overview of What Constitutes an Appropriation.**

An appropriation is authority, derived from the Legislature, for a governmental entity to expend money from the state treasury for a specified public purpose.<sup>8</sup> An appropriation is required in order for a state entity to expend money from the state treasury unless the money is from nonstate and nonfederal sources restricted by law or by the terms of an agreement, such as a contract, trust agreement, or donation.

Article VIII, section 14, of the Montana Constitution provides:

Except for interest on the public debt, no money shall be paid out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof.

The scope of the legislative appropriation power under the 1972 Montana Constitution was determined in 1975 in the companion cases of *State ex rel. Judge v. Legislative Finance Committee*, 168 Mont. 470, 543 P.2d 1317 (1975), and *Board of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975).

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<sup>8</sup> See *State ex rel. Haynes v. District Court*, 106 Mont. 470, 480, 78 P.2d 937, 943 (1938).

The Montana Supreme Court in *Board of Regents* noted that the 1972 Montana Constitution had broadened the scope of the appropriation power. Previous court decisions had limited the scope of the appropriation power to the general fund.<sup>9</sup> The Court cited Article VI, section 9, requiring the Governor to submit to the Legislature a budget "setting forth in detail for all operating funds the proposed expenditures and estimated revenue of the state"; Article VIII, section 9, concerning a balanced budget; and Article VIII, section 12, requiring strict accountability of revenue and expenditures. The Court said:

Thus the legislative appropriation power now extends beyond the general fund and encompasses all those public operating funds of state government.<sup>10</sup>

The constitutional provisions and interpretations concerning appropriations are implemented by section 17-8-103(2), MCA, which provides that a "condition or limitation contained in an appropriation act shall govern the administration and expenditure of the appropriation until the appropriation has been expended for the purpose set forth in the act or until such condition or limitation is changed by a subsequent appropriation act. In no event does a condition or limitation contained in an appropriation act amend any other statute."

Finally, it should be noted that an appropriation and a fund transfer are not the same thing. In 1992, Attorney General Racicot had the opportunity to address the difference between spending money and transferring money to another state account.<sup>11</sup> In his opinion, Attorney General Racicot responded to a question regarding the validity of a statute that required the State Auditor to pay the Administrator of the Public Employees' Retirement Division money that was collected from insurance taxes, despite the fact that an appropriation did not exist. In determining that the statute was valid, the opinion recognized that Article VIII, section 14, of the Montana Constitution requires an appropriation when money is "paid out of the treasury". However, the opinion also addressed the fact that when money is "transferred between accounts *within* the state treasury", an appropriation is not required. Consequently, the statute requiring the transfer of money from one fund to another was considered valid because a transfer between funds was not synonymous with spending money from the state treasury.

As applied here, the grants that were struck in HB 351 were not appropriations of money. The appropriations that provided potential funding for the 36 grants were listed separately (\$13,753,578 and a conditional appropriation up to \$840,000). Moreover, the government entity that was authorized by the Legislature to spend the money out of the treasury was the Department, not the local government grant recipients. This distinction is highly relevant if the Governor's line-item veto authority is limited to striking appropriations of money and conditions attached to the appropriation as opposed to other matters in an appropriation bill.

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<sup>9</sup> *State ex rel. Aeronautics Comm'n v. Bd. of Examiners*, 121 Mont. 402, 194 P.2d 633 (1948), *overruled in Bd. of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975); *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 195 P. 841 (1921), *overruled in Bd. of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975).

<sup>10</sup> *Board of Regents*, 168 Mont. at 446.

<sup>11</sup> See 44 A.G. Op. 43 (1992).

## 2. What is an Item? The 1972 Constitutional Convention and Montana Supreme Court Cases.

As stated previously, the Montana Constitution provides that the Governor may veto items in appropriation bills. The term "items" is not defined in the 1972 Constitution, nor was it defined in the 1889 Constitution. In explaining the 1972 provision, Delegate Joyce stated:

This section preserves the current line-item veto that's in the Montana Constitution, the idea being that general appropriations bills go through with more than one item in there. There may be a hundred different appropriations. He doesn't have to veto the entire appropriation bill if he is displeased with only one item. He can veto that one item. And when he does so, the procedure on this is the same as on any other bill that he vetoes. It requires the two-thirds vote to override him.<sup>12</sup>

Additionally, Delegate Joyce stated:

The committee considered and rejected the so-called reduction veto, which is the power to reduce items in appropriation bills, because the members believed such a veto could result in irresponsibility on the part of the Governor. The reduction veto encourages the Legislature to appropriate large sums of money to popular causes, shifting the onus of reducing the appropriation to the Governor, while it also enables the Governor to thwart an activity or program without the stigma of killing it.<sup>13</sup>

I am unaware of any further testimony from the 1972 Constitutional Convention that may shed light on the issue of what constitutes an item, but an argument could be made that "item" and "appropriations" were seen as the same thing. Additionally, there are no reported Montana Supreme Court cases that define the term. However, there are cases that give insight on what is permissible.

In *Mills v. Porter*, Governor Dixon used a similar line-item veto provision in the 1889 Montana Constitution to scale back appropriations of money by deducting a certain percentage of the amount appropriated.<sup>14</sup> The Montana Supreme Court recognized that governmental powers are divided into three distinct departments and that "no person or collection of persons charged with the exercise of powers belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this Constitution expressly directed or permitted."<sup>15</sup> It considered the Governor's veto power as a grant of power, as opposed to a limitation. The Court reasoned:

The veto is distinctly a negative, not a creative, power. The general rule is that the governor may not exercise any creative legislative power whatsoever; and it is so in Montana.<sup>16</sup>

<sup>12</sup> Verbatim tr., Mont. Const. Conv., Vol. IV at 956, available at [http://courts.mt.gov/content/library/mt\\_cons\\_convention/vol4.pdf](http://courts.mt.gov/content/library/mt_cons_convention/vol4.pdf).

<sup>13</sup> *Id.* at 949.

<sup>14</sup> *Mills v. Porter*, 69 Mont. 325, 327-28, 222 P. 428, 429 (1924).

<sup>15</sup> *Id.* at 329, 222 P. at 430.

<sup>16</sup> *Id.* at 331, 222 P. at 430.

As such, the *Mills* Court held that no matter how praiseworthy the purpose in scaling various appropriations may have been, "it must be held--for it cannot lawfully be held otherwise--that when the governor assumed the power he attempted to exercise he was treading upon ground whereon he had no right to go."<sup>17</sup>

In *Davidson v. Ford*, the Veterans Welfare Commission alleged that the General Appropriations Act for the 1945 biennium violated the "more than one subject" requirement in the Constitution by taking away the Commission's broad statutory power to spend money allotted to it from appropriations.<sup>18</sup> As enacted, the General Appropriations Act appropriated \$50,000 to the Commission, but the money was restricted so that no portion could be expended on salaries or expenses of administration or for attorney fees.<sup>19</sup> In analyzing this restriction the Montana Supreme Court stated:

Whatever one may think as to the wisdom of this restriction on the Commission, it was within the legislative power to so provide in the bill. It must be remembered that "the Legislature of this state possesses plenary legislative power and authority, except in so far as it is limited by the Constitution of the United States, \* \* \* and by the Constitution of this state."<sup>20</sup>

Giving deference to the Legislature's power to set conditions for the expenditure and accounting of an appropriation, the Montana Supreme Court upheld the constitutionality of the act.<sup>21</sup>

In *Board of Regents v. Judge*, the Montana Supreme Court analyzed the Legislature's power to condition appropriations under the 1972 Constitution.<sup>22</sup> In doing so, the Court reviewed an appropriation to the Board of Regents that was contingent upon the Regents certifying that the Board would comply with a variety of provisions, including the disbursement of private funds and limitations on salary increases for presidents and the commissioners of higher education.<sup>23</sup> The Regents asserted that the certification was an improper legislative infringement on the authority of the Board.<sup>24</sup> The Court partially agreed and determined that it is impermissible for the Legislature to do indirectly through the means of line-item appropriations and conditions what is impermissible for it to do directly.<sup>25</sup> However, the Court also recognized that the Legislature is authorized to assert control over expenditures through itemization as part of the decisionmaking process involved in providing a balanced budget, in providing a system of strict accountability, and in fulfilling audit responsibilities. Balancing these interests, the Court revised the restrictions that were an unconstitutional invasion of the Regents' authority. In doing so the Court held:

[T]he conditioning of university system appropriations by the 1975 Montana legislature and the summary procedure for compliance were proper exercises of its

<sup>17</sup> *Id.* at 337-38, 222 P. at 433.

<sup>18</sup> *Davidson v. Ford*, 115 Mont. 165, 167-68, 171, 141 P.2d 373, 374-76 (1943).

<sup>19</sup> *Id.* at 170, 141 P.2d at 376.

<sup>20</sup> *Id.* at 172-173, 141 P.2d at 377 (quoting *State ex rel. Evans v. Stewart*, 53 Mont. 18, 161 P. 309, 311).

<sup>21</sup> *Id.* at 173, 141 P.2d at 377.

<sup>22</sup> *Board of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975).

<sup>23</sup> *Id.* at 438-39, 543 P.2d at 1327.

<sup>24</sup> *Id.* at 441-42, 1328-29.

<sup>25</sup> *Id.* at 450, 534 P.2d at 1333.

appropriation powers to the extent the conditions do not infringe on the constitutional powers granted the Regents. This means the conditions must be *individually scrutinized* to determine their propriety. The fact that there are numerous conditions and a requirement of blanket compliance does not in itself infringe upon the Regents' constitutional powers.<sup>26</sup>

### 3. One Lone Montana District Court Case: *Cobb v. Schweitzer*.

Although there are no reported Montana Supreme Court cases that define what constitutes an item, in a 2006 District Court case entitled *Cobb v. Schweitzer*, the Court was asked to determine whether the Governor had the authority to veto language in House Bill 2 (*i.e.*, the General Appropriations Act) without vetoing the appropriation to which the language is attached.<sup>27</sup> The Court reviewed all of the cases cited in section A.2 of this analysis and ultimately relied on an Iowa Supreme Court case when it determined that the Governor has the right to veto:

- 1) a specific appropriation contained in the bill;
- 2) a condition that limits the use to which an appropriation may be put, but only if the appropriation to which it is attached is vetoed as well; and
- 3) a rider, which is defined as an unrelated substantive piece of legislation.<sup>28</sup>

The *Cobb* case was never appealed to the Montana Supreme Court. Unlike HB 351, the *Cobb* case analyzed the General Appropriations Act, which pursuant to Article V, section 11(4), of the Montana Constitution can contain "only appropriations for the ordinary expenses of the legislative, executive, and judicial branches, for interest on the public debt, and for public schools", as opposed to an appropriation bill that does not have a substantive law limitation.<sup>29</sup> Consequently, there is uncertainty as to how the District Court would have ruled if it had been reviewing a single subject appropriation bill like HB 351. Nevertheless, the *Cobb* case is instructive in regard to what a court may consider. If it was applied in the case of HB 351, one could argue that the grants were conditions of the appropriation that could not be vetoed without a veto of the appropriation.

## B. ANALYSIS USING MONTANA SUPREME COURT CASES.

Was it a proper exercise of the Governor's veto power under Article VI, section 10(5), of the Montana Constitution to strike out individual grants to local government entities in HB 351? There are valid arguments on both sides of the issue. Regrettably, court cases across the United States do not provide any clarity in regard to what constitutes an "item". On one end of the spectrum some states defer to a legislative branch and allow only the strike-out of appropriations, while on the other end of the spectrum some states defer to the veto power of a governor.<sup>30</sup>

<sup>26</sup> *Id.* at 451, 543 P.2d at 1333-34.

<sup>27</sup> *Cobb v. Schweitzer*, Cause No. CDV-2005-320, 2006 Mont. Dist. LEXIS 257 (1st Jud. Dist. Mar. 31, 2006).

<sup>28</sup> *Id.* ¶ 29 (citing *Rants v. Vilsack*, 684 N.W.2d 193 (Iowa 2004)).

<sup>29</sup> See *id.* ¶¶ 2, 6.

<sup>30</sup> See Richard Briffault, *The Item Veto in State Courts*, 66 Temp. L. Rev. 1171, 1184-85 (1993).

The Montana Supreme Court has stated that conditions in an appropriation bill must be individually scrutinized by a reviewing court to determine their propriety.<sup>31</sup> As such, a reviewing court would likely address whether the Governor exercised any creative veto power and whether the grants were conditions of the appropriation or the proper subject of a line-item veto.

### **1. Creative Veto Power vs. Strikes With the Red Pen.**

The Montana Supreme Court recognizes that the line-item veto is distinctly a negative, not a creative, power.<sup>32</sup> The general rule is that the Governor may not exercise any creative legislative power.<sup>33</sup> It is impermissible for the Governor to reduce or increase an appropriation.

As applied here, it could be argued that the Governor exercised creative legislative power when he struck out projects. Indeed, the projects were ranked by the Legislature in order of priority.<sup>34</sup> When higher-ranked projects were struck from the bill, the probability of lower-ranked projects receiving funding increased. The elimination of the projects resulted in \$3,632,914 being available for other projects, and ultimately money that was appropriated will not be used. This defeated the intent of the Legislature to use the appropriation for projects with a higher ranking.

On the other hand, the Governor could argue that unlike the Governor in *Mills v. Porter*, he did not change the amount of the appropriation. All of the projects were struck out with a red pen and nothing more.

### **2. Conditions of an Appropriation vs. Proper Veto of Expenditures.**

The Montana Supreme Court has determined that the Legislature is authorized to assert control over expenditures through itemization as part of the decisionmaking process involved in providing a balanced budget, in providing a system of strict accountability, and in fulfilling audit responsibilities.<sup>35</sup> The fact that there are numerous conditions and a requirement of blanket compliance does not in itself infringe upon the constitutional powers of a government entity.<sup>36</sup> The Legislature has the power to attach a condition to an appropriation as long as the condition is germane to the purpose of the appropriation and does not infringe on the constitutional powers of a government entity. However, it is impermissible for the Legislature to do indirectly through the means of line-item appropriations and conditions what is impermissible for it to do directly.<sup>37</sup>

As applied here, it is not uncommon for the Legislature to define the limits of an appropriation and determine how the appropriation is used. As such, a court could determine that all of the grants in HB 351 are conditions of the total appropriation. If this is the case, then all of the grants and the appropriation would be seen as one item and it would be impermissible to strike the grants without

<sup>31</sup> *Board of Regents*, 168 Mont. at 451, 543 P.2d at 1333.

<sup>32</sup> *Mills*, 69 Mont. at 331, 222 P. at 430.

<sup>33</sup> *Id.*

<sup>34</sup> See sec. 1(3), Ch. 389, L. 2011.

<sup>35</sup> *Board of Regents*, 168 Mont. at 449-50, 543 P.2d at 1332-33.

<sup>36</sup> *Id.* at 451, 543 P.2d at 1334.

<sup>37</sup> *Id.* at 450, 543 P.2d at 1333.



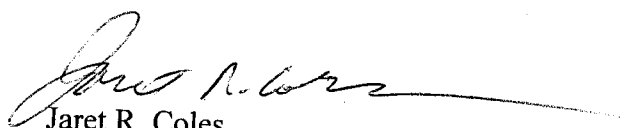
striking the appropriation and the conditions attached to the appropriation. Also, unlike *Board of Regents v. Judge*, where the Legislature conditioned the appropriation on a government entity giving up constitutional powers, the grant conditions and the listings are not conditions that take away constitutional power. The Legislature has plenary power to appropriate money and set conditions for government projects.

On the other hand, the Governor could argue that all of the grants were similar to appropriations, as they were project listings with a monetary grant amount, and that the term "item" should encompass monetary values. The Governor could also argue that the grants are severable from HB 351 and that the remaining projects can go forward without impacting the implementation of the bill. In order to prevail under this argument, a reliance on case law outside of Montana could be necessary.

In conclusion, based on the absence of Montana case law on the subject of what constitutes an item, there is no way to predict with certainty how the courts would rule. However, the fact that the Legislature clearly defined the appropriations, ranked the projects in order of priority, and has the authority to appropriate money and set conditions for government projects and the treasure state endowment program are positive factors. Indeed, HB 351 is similar to multiple treasure state endowment bills that were approved by both Governor Schweitzer and other governors.<sup>38</sup>

Thank you for the opportunity to provide you with this analysis. Please let me know if you have any additional questions or concerns.

Sincerely,

  
Jaret R. Coles  
Legislative Staff Attorney

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<sup>38</sup> Ch. 458, L. 2009 (signed by Governor Schweitzer on May 6, 2009 ), available at <http://data.opi.mt.gov/bills/2009/billpdf/HB0011.pdf>; Ch. 580, L. 2005 (signed by Governor Schweitzer on May 6, 2005), available at <http://data.opi.mt.gov/bills/2005/billhtml/HB0011.htm>; Ch. 587, L. 2003 (signed by Governor Martz on May 9, 2003), available at <http://data.opi.mt.gov/bills/2003/billhtml/HB0011.htm>; Ch. 435, L. 2001 (signed by Governor Martz on April 30, 2001), available at <http://data.opi.mt.gov/bills/2001/billhtml/HB0011.htm>; Ch. 517, L. 1999 (signed by Governor Racicot on April 29, 1999), available at <http://data.opi.mt.gov/bills/billhtml/HB0011.htm>.